

A Victor Cham & Anor v Loh Bee Tuan

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02-468 OF 2002
ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND TENGKU
BAHARUDIN SHAH JJCA
26 AUGUST 2004

C *Companies and Corporations — Directors — Personal liability — Fraud — Whether director could be sued for fraudulent misrepresentation committed by company*

D *Legal Profession — Duty of care — Common solicitor — Common solicitor for vendor and end financier with purchaser in sale and purchase of property — Failure of solicitor to secure redemption agreement on behalf of end financier — Purchaser exposed to risk of losing property if foreclosure being taken by chargee — Whether solicitor owed duty to purchaser — Whether solicitor had breached duty under implied retainer*

E *Legal Profession — Retainer — When presumed — No evidence in writing to support a retainer — Whether retainer may reasonably be implied from facts of case*

F *Tort — Fraud — Misrepresentation — Whether fraudulent misrepresentation could not have been committed in sale and purchase agreement without approval of the director — Whether director of company could be sued for fraudulent misrepresentation committed by company*

G By a sale and purchase agreement dated 6 September 1985 ('the SPA'), the respondent/plaintiff agreed to purchase from the first defendant the property in issue ('the subject property') at the agreed price of RM170,000. The subject property was erected on a piece of land ('the land'). At the time of the sale transaction, no subsidiary title had been issued in respect of the subject property. The first appellant was at all material times a registered shareholder, director and company secretary of the first defendant. The second appellant was acting as solicitors for both the respondent and the first defendant in the sale and purchase transaction.

H The land was charged to Sabah Bank Bhd under charges which were duly registered with the Land Office on various dates, both before and after the execution of the SPA. The land, including the subject property, was subsequently foreclosed by Sabah Bank Bhd on 28 May 1993 and was sold to a third party.

I The respondent filed this action against the first appellant on tort for alleged fraudulent misrepresentation and/or conspiracy with the second defendant to defraud or deceive the respondent. The first appellant resisted the claim on the ground that as director of the first defendant, a limited company, he was not legally liable either in tort or contract for the act or omission on the part of the company,

as the company, is a distinct legal entity from its shareholders or directors. The learned judge found beyond reasonable doubt that the fraudulent misrepresentation could not have been committed by the first defendant without the authorization or consent of first appellant, who was not only the director and secretary of the first defendants but also held a substantial shareholding in the first defendant company.

As against the second appellant, the respondent contended that the second appellant was acting as solicitors for both the respondent and the first defendant in the sale and purchase transaction of the shop lot and the preparation of the relevant documentations. On that premise the respondent contended that the second appellant as her solicitor owed her a duty to exercise proper skill, professional care and diligence in or about the sale and purchase transaction. In particular it was alleged that the second appellant failed to make proper searches on the title as to encumbrances and as regard the redemption of the relevant charges.

The learned High Court judge allowed the plaintiff's claim. The first and second appellants appealed.

Held, dismissing the appeal, but reducing the award of damages from RM208,587 to RM172,673:

- (1) The court agreed with the finding of the learned judge that the fraudulent misrepresentation could not have found its way into the SPA without the approval of the first appellant (see para 14).
- (2) Reading cl 6 of the SPA, it was justified for the respondent to think that the second appellant was in fact acting as her solicitor. Although there was no evidence in writing to support a retainer between the respondent and the second appellant, in the circumstances of this case, a retainer may reasonably be implied (see para 19). Given the fact that the second appellant was acting as solicitor for both the vendor and the end financier on the one hand and the purchaser on the other, the standard of care required of the second appellant was, in the circumstances, indeed high (see para 24). The learned trial judge had rightly come to his finding that in the circumstances the second appellant had been in breach of his duty as solicitor of the respondent under the implied retainer (see para 25).
- (3) The court agreed with the learned judge that the second appellant in failing to secure the redemption agreement on behalf of the end financier would expose the respondent to the risk of losing the subject property in the event of a foreclosure being taken by the chargee. This had caused resultant loss on the respondent. Therefore, there was sufficient proximity between the second appellant and the respondent as to render the second appellant liable to the respondent for his omission to take the necessary measure to secure the redemption agreement from the chargee (see para 27).
- (4) Since no documentary evidence was tendered in support of the amount claimed under items 3 and 5 of the statement of claim, the award under these items could not stand. With regard to item 4 (ie interest incurred in respect of the loan from the credit company), although they must have been incurred by

A the respondent, but taking into account the fact that the respondent had occupied the subject property rent free during the relevant period, this item should rightly be set off against the said benefit. For that reason item 4 was also disallowed. The award was accordingly reduced (see paras 30–31).

B [Bahasa Malaysia summary]

C Melalui satu perjanjian jual beli bertarikh 6 September 1985 ('PJB'), responden/plaintif bersetuju untuk membeli daripada defendan pertama hartanah yang dipersoalkan ('hartanah tersebut') pada harga yang dipersetujui iaitu RM170,000. Hartanah tersebut telah dibina atas sebidang tanah ('tanah tersebut'). Pada masa transaksi jualan, tiada hak milik subsidiari telah dikeluarkan berkaitan hartanah tersebut. Perayu pertama pada setiap masa matan merupakan pemegang saham berdaftar, pengarah dan setiausaha syarikat defendan pertama. Perayu kedua bertindak sebagai peguam kedua-dua responden dan defendan pertama dalam transaksi jual beli tersebut.

D Tanah tersebut telah dicagarkan kepada Bank Sabah Bhd di bawah gadaian yang didaftarkan dengan Pejabat Tanah pada tarikh-tarikh berbeza, iaitu sebelum dan selepas penyempurnaan PJB itu. Tanah tersebut, termasuklah hartanah tersebut, kemudiannya telah dihalang tebus oleh Bank Sabah Bhd pada 28 Mei 1993 dan dijual kepada pihak ketiga.

E Responden telah memfailkan tindakan ini terhadap perayu pertama berdasarkan tort kerana dikatakan telah memberi gambaran salah yang berunsur fraud dan/atau berkonspirasi dengan defendan kedua untuk menipu atau memperdaya responden.

F Perayu pertama menolak dakwaan itu atas alasan yang sebagai pengarah defendan pertama, sebuah syarikat berhad, beliau tidak bertanggungjawab dari segi undang-undang sama ada dalam tort mahupun kontrak untuk tindakan atau peninggalan di pihak syarikat, sebagai syarikat, ia adalah satu entiti sah yang berbeza daripada pemegang saham atau pengarahnya. Hakim yang bijaksana mendapati

G melampaui keraguan munasabah bahawa salah gambaran berunsur fraud tidak mungkin dilakukan oleh defendan pertama tanpa pemberian kuasa atau persetujuan perayu pertama, yang bukan sahaja pengarah dan setiausaha defendan pertama tetapi juga memegang sebahagian besar saham dalam syarikat defendan pertama.

H Terhadap perayu kedua, responden menegaskan bahawa perayu kedua bertindak sebagai peguam bagi pihak kedua-dua responden dan defendan pertama dalam transaksi jual beli lot kedai itu dan penyediaan dokumentasi yang relevan. Berdasarkan premis tersebut responden menegaskan bahawa perayu kedua sebagai peguamnya mempunyai kewajiban untuk melaksanakan kemahiran yang betul, sikap berhati-hati dan ketekunan yang profesional dalam atau tentang transaksi jual beli itu. Khususnya ia dikatakan bahawa perayu kedua telah gagal untuk membuat carian

I yang betul ke atas hak milik itu berhubung sekatan-sekatan dan berkaitan mendapat balik caj-caj berkaitan.

Hakim Mahkamah Tinggi yang bijaksana telah membenarkan tuntutan plaintif. Perayu-perayu pertama dan kedua telah merayu.

Diputuskan, menolak rayuan tersebut tetapi mengurangkan award ganti rugi daripada RM208,587 kepada RM172,673:

- (1) Mahkamah bersetuju dengan penemuan hakim yang bijaksana bahawa gambaran salah berunsur fraud itu tidak mungkin termasuk dalam PJB itu tanpa persetujuan perayu (lihat perenggan 14). A
- (2) Dengan membaca kl 6 PJB, adalah dijustifikasikan untuk responden berfikir bahawa perayu kedua sememangnya bertindak sebagai peguamnya. Meskipun tiada keterangan bertulis untuk menyokong retainer antara responden dan perayu kedua, dalam keadaan kes ini, satu retainer boleh secara munasabah tersirat (lihat perenggan 19). Berdasarkan fakta bahawa perayu kedua bertindak sebagai peguam bagi pihak kedua-dua penjual dan pembiaya akhir di satu pihak dan pembeli di satu pihak lagi, piawai berjaga-jaga yang dikehendaki daripada perayu kedua adalah, dalam keadaan berikut, amat tinggi (lihat perenggan 24). Hakim perbicaraan yang bijaksana adalah betul dalam penemuannya bahawa dalam keadaan sedemikian perayu kedua telah melanggar kewajipannya sebagai peguam responden di bawah satu retainer tersirat (lihat perenggan 25). B
- (3) Mahkamah bersetuju dengan hakim yang bijaksana bahawa perayu kedua apabila telah gagal mendapatkan perjanjian penebusan bagi pihak pembiaya akhir akan mendedahkan responden kepada risiko kehilangan hartanah tersebut sekiranya satu halang tebus diambil oleh penggadai. Ini mengakibatkan kehilangan yang terjadi kepada responden. Oleh itu, terdapat kedekatan yang memadai antara perayu kedua dan responden untuk menyebabkan perayu kedua bertanggungjawab kepada responden kerana peninggalannya untuk mengambil langkah perlu bagi mendapatkan perjanjian penebusan daripada penggadai (lihat perenggan 27). C
- (4) Memandangkan tiada keterangan dokumentari telah dikemukakan untuk menyokong jumlah yang dituntut di bawah item-item 3 dan 5 pernyataan tuntutan, award di bawah item-item tersebut tidak boleh kekal. Berhubung item 4 (iaitu faedah yang dikenakan berkaitan pinjaman daripada syarikat kredit), meskipun ia telah dikenakan oleh responden, namun dengan mengambil kira fakta bahawa responden telah mendiami hartanah tersebut bebas daripada sewa sepanjang tempoh berkaitan, item ini dengan betul patut diketepikan terhadap faedah tersebut. Atas alasan itu item 4 juga tidak dibenarkan. Award tersebut sewajarnya telah dikurangkan (lihat perenggan 30–31).] D

Notes

For a case on duty of care of a common solicitor, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1564.

For a case on retainer, when presumed, see 9 *Mallal's Digest* (4th Ed, 2003 Reissue) para 2013. E

For cases on misrepresentation, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 545–547. F

For cases on personal liability of directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 268–273. G

H

I

A Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd [1977] 3 MLJ 661 (refd)

British Thomson–Houston Co Ltd v Sterling Accessories, Ltd [1924] All ER Rep 294 (refd)

B *C Evans & Sons Ltd v Spritebrand Ltd & Anor* [1985] 2 All ER 415 (refd)

Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor [1989] 3 MLJ 434 (refd)

Donoghue v Stevenson [1932] AC 562 (refd)

Gran Gelato Ltd v Richcliff (Group) Ltd [1992] 1 All ER 865 (refd)

Griffiths v Evans [1957] 2 QB 455 (refd)

C *Groom v Crocker* [1938] 2 All ER 394 (refd)

Hedley Byrne v Heller [1964] AC 465 (refd)

Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp [1978] 3 All ER 582 (refd)

Muoat v Clark Boyce [1992] 2 NZLR 559 (refd)

Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126 (refd)

Panatron Pte Ltd v Lee Cheow Lee [2001] 3 SLR 405 (refd)

D *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1 (refd)

Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] All ER 48 (refd)

Ross v Caunters [1980] 1 Ch 297 (refd)

Salmon v Salmon and Co [1895–1899] All ER Rep. 33 (refd)

E *Thomas Bruce Morgan v Government of Saskatchewan, Neal Hardy and Darrel Binkley* [1985] Sask R 129 (refd)

Wah Tat Bank Ltd and another v Chan Cheng Kum [1975] 2 All ER 257 (refd)

Wong Cheong Kai & Ors v Hongkong Bank (M) Bhd & Anor [2000] 3 MLJ 419 (refd)

F Appeal from: Suit No K263 of 1989 (High Court, Kota Kinabalu)

Norbert Yapp Chu Chon (Jayasuriya Kah & Co) for the appellant.

Datin Marina Tiu (Yap Chin & Tiu) for the respondent.

G Arifin Zakaria JCA (delivering judgment of the court):

BACKGROUND

H [1] This is an appeal by the first and second appellants (the third and fourth defendants in the court below) against the decision of the learned High Court judge in allowing the plaintiff's claim. We dismissed the appeal, but we reduced the award of damages from RM208,587 to RM172,673. We now give our reasons for our decision.

THE UNDISPUTED FACTS

I

[2] By a sale and purchase agreement dated the 6 September 1985 ('the SPA'), the respondent/plaintiff agreed to purchase from the first defendant the property referred to as Ground Floor, Lot A, Wisma Shing Yin ('the subject property') at the agreed price of RM170,000. The subject property is erected on the land comprised in the

land title known as Country Lease No 215328055 ('the said land'). At the time of the sale transaction, no subsidiary title had been issued in respect of the subject property.

A

[3] The respondent came to know about the subject property through an advertisement put up by the first defendant in a local newspaper. To finance the purchase, the respondent obtained a loan of RM102,000 from S Y Jie Credit Sdn Bhd ('the credit company'). A loan agreement was entered into on the 6 September 1985 between the respondent and the credit company. The SPA and loan agreement together with the memorandum of charge in escrow were prepared by and executed in the office of the second appellant legal firm. The legal fee in respect of the same and stamp duty, amounting to RM2,673 were paid by the respondent to the second appellant. The respondent was given possession of the subject property on the date of the execution of the SPA.

B

C

[4] The first appellant was at all material times a registered shareholder (having 204000 shares), director and company secretary of the first defendant. He was also the company secretary of the credit company. The said land was charged to Sabah Bank Berhad under six memoranda of charges which were duly registered with the Land Office on various dates, both before and after the execution of the SPA. The said land, including the subject property, was subsequently foreclosed by Sabah Bank Berhad on 28 May 1993 and was sold to one Datin Rupiah bte Bachee Khan.

D

E

[5] The respondent brought this action claiming against the four defendants jointly and severally the sum of RM208,587 (which includes the purchase price and other expenses), damages, statutory interest and costs. The action against the first and second defendants was not proceeded with as the first defendant company had since been deregistered while the second defendant had passed away. At end of the hearing, the learned judge allowed the respondent's claim with interest and costs against the first and second appellants.

F

THE CASE AGAINST THE FIRST APPELLANT

G

The respondent claims that he was induced into purchasing the subject property on the representation contained in cl 9 of the SPA which provides:

Warranty of Good Title

9. The Developer hereby warrant that they have a good title to the said unit and that it is free from any trust, caveat, pending action, adverse possession and any other liabilities binding the same and hereby undertake to indemnify the Purchaser the fullest extent of any loss in the event of any breach of the warranty hereby given.

H

[6] The claim against the first appellant is founded in tort for alleged fraudulent misrepresentation and/or conspiracy with the second defendant to defraud or deceive the respondent. This is contained in para 19 of the further amended statement of claim. In para 6 of the same, the respondent asserts that acting on the faith and truth of the said representations and warranties the respondent made and completed the SPA and paid the full purchase price of the subject property to the first defendant.

I

A THE DEFENCE OF THE FIRST APPELLANT

- [7] The first appellant resisted the claim on the ground that as director of the first defendant, a limited company, he is not legally liable either in tort or contract for the act or omission on the part of the company, as the company, is a distinct legal entity from its shareholders or directors. In support counsel for the 1st appellant cited the celebrated case of *Salmon v Salmon and Co* [1895–1899] All ER Rep. 33. He further relied on the Court of Appeal's decision in *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd* [1977] 3 MLJ 661 which held that the fact that the agreement was executed by the second and third respondents in that case as directors of Nusantara Timur does not make them personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely that of Nusantara Timur. The case of *British Thomson-Houston Co Ltd v Sterling Accessories, Ltd* [1924] All ER Rep 294, was also cited in support of the defence. The learned judge disagreed with the 1st appellant on this point. Relying on *C Evans & Sons Ltd v Spritebrand Ltd & Anor* [1985] 2 All ER 415 and *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] All ER 48, he agreed with the learned counsel for the respondent that a director may be held liable for tortuous acts of his company if the director has ordered or procured the commission of the acts complained of.

THE LAW

- E** [8] In *C Evans & Sons Ltd v Spritebrand Ltd & Anor*, Slade LJ relying on the case of *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1 stated the legal position in the following words:
- F** The mere fact that a person is a director of a limited company does not by itself render him liable for torts committed by the company during the period of his directorship: see, for example, *Rainham Chemical Works Ltd (in liq) v Belvedere Fish Guano Co Ltd* [1924] 2 AC 465 at 488,.... Nevertheless, judicial dicta of high authority are to be found in English decisions which suggest that a director is liable for those tortuous acts of his company which he has ordered or procured to be done.
- G** [9] In *Wah Tat Bank Ltd and another v Chan Cheng Kum* [1975] 2 All ER 257, two banks brought an action against a shipping company and C, the company chairman and managing director, claiming damages jointly against them for conversion. In holding C liable, the Privy Council in its judgment delivered by Lord Salmon stated:
- H** No doubt the fact that the respondent is chairman and managing director of HSC does not of itself make him personally liable in respect of that company's tortuous acts. A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated. There are many such cases reported in the books. If however the chairman or managing director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it: *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* per Atkin LJ. Each case depends on its own particular facts. In the instant case the un-contradicted evidence proves that early in 1961 the respondent, as chairman and managing director of HSC, agreed with the directors of TSC the terms on which HSC would continue wrongfully to convert goods consigned to the banks just as they had done in the past. Their Lordships consider that in all the
- I**

circumstances there is no answer to the banks' contention that the respondent was personally liable for the conversion in respect of which judgement has been entered against HSC.

A

[10] It is pertinent to note that the Privy Council emphasized the point that each case will depend on its own particular facts.

B

[11] In *Thomas Bruce Morgan v Government of Saskatchewan, Neal Hardy and Darrel Binkley* [1985] Sask R 129, the Saskatchewan Court of Appeal made the following observation:

On this branch of the case we refer to the following passage from judgment of Disber J, in *Einhorn v Westmount Investments Ltd and Belzberg et al.* (1969), 69 WWR (NS) 31, at p 36:

C

Ordinarily an agent is subject to the control of another person, his principal. A company performe is only able to act through its agents and servants. Consequently, while company directors are referred to as 'agent', the cold fact is that they control the company. As the directors pull the strings so the company must of necessity jump. Particularly is this true where, as here, the individual defendants were in 'complete control' of the company. This court in the exercise of its common-law jurisdiction in the field of tort considers the realities of the situations which come before it for decision, and the court is not restricted in so doing because individual carries out intentional tortuous acts through the medium of a puppet corporation whose every action they control. Individuals guilty of intentional tortuous acts do not escape personal liability by this device of clothing themselves in a corporate veil of their own spinning.

D

E

And further the court said:

So a director is not to be held liable merely because he is a director but may be liable when he participates in or orders a tortuous act and cannot escape personal liability by asserting that his act was merely the act of the corporation. In other words, the 'corporate veil' is not to be used as a shield to protect shareholders and directors when they have been guilty of wrongdoing. This approach is consistent with the notion that everyone should be answerable for his tortuous acts.

F

G

[12] The issue before us is whether the first appellant here had authorized the commission of the fraudulent misrepresentation as contained in the SPA.

[13] Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim, the respondent in this case need to establish that he had acted in reliance on the fraudulent misrepresentation and that the representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation, the respondent had suffered damage. For the elements of the tort of deceit, see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405.

H

I

[14] The learned judge having considered the facts in this case came to his finding that he was satisfied beyond reasonable doubt that the fraudulent misrepresentation could not have been committed by the first defendant without the authorization or consent of first appellant, who was not only the director and secretary of the first

A defendant but also holds a substantial shareholding in the first defendant company. We have carefully scrutinized the reasons given by the learned judge and we are satisfied that he was wholly justified in coming to the said conclusion. Firstly, it is not in dispute that the first appellant signed the SPA in his capacity as secretary and director of the first defendant. Even though in his testimony he claimed that he did not read the SPA before putting his signature to it, we agree with the learned judge that this is difficult to accept for the following reasons. The first appellant is an educated man. He works as the office manager of a law firm. In his evidence, he said that as office manager of a law firm he is familiar with conveyancing procedure. So it is reasonable to assume that he must have read the fine letters of the SPA before putting his signature to it. Coupled with that is the fact that his own brother DW2, who was found by the learned judge to be the brain behind the scheme to attract potential purchasers for the said project, was the person responsible for the preparation of the SPA, which promised a clean title. In this regard, we also need to take into account the fact that only two SPAs were executed in respect of the project. It is, therefore, highly unlikely in the circumstances for the representation contained in the SPA to have escaped the attention of the first appellant. Thus from the evidence before the court, we agree with the finding of the learned judge that the said fraudulent misrepresentation could not have found its way into the SPA without the approval of the first appellant.

E [15] For the above reasons, we are of the view that there is no merit in the appeal by the first appellant as regards liability. It is accordingly dismissed.

THE CASE AGAINST THE SECOND APPELLANT

F [16] The second appellant was a firm of solicitors who prepared the SPA and the loan agreement together with the memorandum of charge in escrow. It is not in dispute that these documents were executed in the office of the second appellant and legal fees amounting to RM2,673 was paid by the respondent to the second appellant for the SPA and the memorandum of charge. The respondent contends that the second appellant was acting as solicitors for both the respondent and the first defendant in the sale and purchase transaction of the shop lot and the preparation of the relevant documentations. This is supported by cl 6 of the SPA which refers to Messrs Ronny Cham & Co as the 'parties' solicitor', meaning that the second appellant was the common solicitor for both the vendor and the purchaser. On that premise, the respondent contends that the second appellant as her solicitor owes her a duty to exercise proper skill, professional care and diligence in or about the said sale and purchase transaction. In particular, it is alleged that the second appellant failed to make proper searches on the title as to encumbrances and as regard the redemption of the relevant charges. In the alternative, the respondent claims in negligence.

I [17] It is settled law that a solicitor may be liable in contract in respect of any breach of contractual duty as a solicitor and in the alternative he may be held liable in tort for negligence, independent of contract as a professional man professing

special skill who offer assistance to another and owed a duty of care to that other person who relied on his skill (see *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126).

A

LIABILITY IN CONTRACT

B

[18] On this issue, the learned judge first asked the question whether in the first place the second appellant was acting as solicitor of the respondent. After a detail analysis of the evidence before him, the learned judge answered the question in the affirmative. In particular, he relied on cl 6 of the SPA which expressly provides that the transfer documents shall be kept by the parties' solicitors Messrs Ronny Cham & Co, the second appellant herein.

C

[19] Having considered the evidence before us and the arguments of parties, it is our finding that the learned judge was justified in coming to his decision. Given cl 6 of the SPA, we think it does not lie in the mouth of the second appellant to say that it was only acting as solicitor for the first defendant and the credit company. Reading the said cl 6 we are of the view that it is justified for the respondent to think that the second appellant was in fact acting as her solicitor. It is true that there is no evidence in writing to support a retainer between the respondent and the second appellant, but we agree with the learned judge that a retainer may be implied from the conducts of parties (see *Halsbury's Laws of England* (3rd Ed), Vol 36 para 87; *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434; *Groom v Crocker* [1938] 2 All ER 394). In the circumstances of this case, we agree that a retainer may reasonably be implied. We find the case of *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 1 All ER 865 and the local case of *Wong Cheong Kai & Ors v Hongkong Bank (M) Bhd & Anor* [2000] 3 MLJ 419, cited to us by the learned counsel for the second appellant, are distinguishable on the facts.

D

E

F

[20] The next issue is whether the second appellant had committed any breach of duty as solicitor of the respondent.

G

[21] The scope of duty of a solicitor toward his client was spelt out in *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp* [1978] 3 All ER 582 at p 583:

Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck*, *Griffiths v Evans* and *Hall v Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

H

I

[22] In *Griffiths v Evans* [1957] 2 QB 455, the Court of Appeal stated that the solicitor's duty to his client would very much depend on the retainer. Thus, it was

A held by a majority (Denning LJ dissenting) that the solicitor in that case, being asked to advise specifically on compensation under the statutes, was not negligent in not advising as to common law rights.

B [23] Reverting to the present case, PW4, a solicitor, specializing in conveyancing, gave evidence that normally it is necessary to explain to the purchaser that he is only acting on behalf of the developer in order to avoid the impression that he is also acting for the purchaser having regard to the fact that normally it is the purchaser who pays the legal fees. He also testified that as a matter of practice he would conduct a search at the Central Land Registry on the status of the land in question, in particular to see whether the land is encumbered or not. His evidence was not challenge by the second appellant.

D [24] It is the finding of the trial court that the second appellant did not at all explain to the respondent that he was only acting as solicitor for the first defendant and the end financier, the credit company. The second appellant further failed to inform the respondent that, contrary to what is stated in the SPA, the subject property was in fact encumbered with five charges. The learned judge further held that as solicitor for the end financier it is incumbent upon the second appellant to carry out the standard redemption agreement with the existing chargees in order to protect the respondent's interest against the risk of losing the property in the event of foreclosure being brought by the chargees. This was not done. In this case, the learned judge also held that it is all the more compelling for the second appellant to conduct the redemption procedure as the end financier and the developer are owned by one and the same person. This is to avoid any possible collusion between the end financier and the developer. Given the fact that the second appellant was acting as solicitor for both the vendor and the end financier on the one hand and the purchaser on the other, we agree with the observation of the learned judge that the standard of care required of the second appellant is, in the circumstances, indeed high (see *Muoat v Clark Boyce* [1992] 2 NZLR 559).

G [25] Having considered the matter, we came to the conclusion that the learned trial judge had rightly come to his finding that in the circumstances the second appellant had been in breach of his duty as solicitor of the respondent under the implied retainer.

H LIABILITY IN NEGLIGENCE

I [26] Apart from his liability under the retainer, the learned judge in the alternative found the second appellant liable to the respondent in tort on the principle in *Hedley Byrne v Heller* [1964] AC 465. He held that the second appellant is liable in negligence to the respondent in making the wrongful representation in the SPA, that the subject property was free from any encumbrance, which was not true. Had it not been for this representation, the respondent would not have proceeded with the purchase of the subject property at all. By giving the wrong representation in the SPA, the second appellant had thereby induced the respondent to act to his detriment.

[27] The learned judge further held the second appellant is liable in tort on the direct application of the neighbour principle in *Donoghue v Stevenson* [1932] AC 562. In *Ross v Caunters* [1980] 1 Ch 297, Megarry J held that 'a solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identifiable third party owes a duty of care towards that third party in carrying out that transaction'. In the present case, we agree with the learned judge that the second appellant in failing to secure the redemption agreement on behalf of the end financier would expose the respondent to the risk of losing the subject property in the event of a foreclosure being taken by the chargee, as had happened here. Further, PW4, in his testimony stated that it is a standard conveyancing practice for solicitor acting for end financier to enter into redemption agreement with the chargee in order to protect the interest of the end financier. The second appellant failed to do just that. This had caused resultant loss on the respondent. On the evidence before us, we hold there is sufficient proximity between the second appellant and the respondent as to render the second appellant liable to the respondent for his omission to take the necessary measure to secure the redemption agreement from the chargee.

[28] For the above reasons, we upheld the decision of the learned judge on the issue of liability as against the second appellant.

DAMAGES

[29] The respondent claims damages in the sum of RM208,587 as particularized in para 25 of the further amended statement of claim which are reproduced below:

Particulars

1. Total purchase price paid in respect of the Shophouse unit to the 1st Defendants	RM 170,000.00
2. Legal fees incurred in respect of the sale and purchase and loan transaction	RM 2,673.00
3. Legal fees and disbursements for lodging and renewal of Caveat in respect of the said property	RM 690.00
balance carried forward	RM 173,363.00
4. Interest incurred in respect of the loan taken for the purchase of the said Shophouse unit	RM 34,712.00
5. Premium for Insurance paid in respect of the said Shophouse unit (1987 – 1988)	RM 512.00
Total	RM 208,587.00

[30] The learned judge allowed the whole sum as claimed. The learned counsel for the respondent admitted that no documentary evidence was tendered in support of items 3 and 5 but contended that as for item 4 this is supported by the 'Memorandum of An Agreement For A Loan' at p 198 of Part C of the record of appeal. We allowed the appeal as regard items 3, 4 and 5 for the following reasons. As for items 3 and 5, we disallowed these items since, as conceded by learned counsel

- A** for the respondent, no documentary evidence was tendered in support of the same. On that premise, the award under these items could not stand. With regard to item 4, that is interest incurred in respect of the loan from the credit company, we are satisfied that they must have been incurred by the respondent, but taking into account the fact that the respondent had occupied the subject property rent free during the relevant period, we hold that this item should rightly be set off against the said benefit. For that reason, we disallowed item 4.
- B**

THE RESULT

- C** [31] In the result, we dismissed the appeals herein as regard liability, but we allowed partially the appeals with regard to quantum as indicated above. We awarded costs to the respondent, but as the appellants had succeeded partially in their appeals on the quantum, we ordered that the appellants be given a reduction of 15% of the taxed costs.
- D** [32] Deposit to be paid out to the respondent towards account of taxed costs.
- E** [33] My learned brother, Tengku Baharudin Shah JCA has seen this judgment in draft and has expressed his agreement with the draft. However, my learned brother, Abdul Kadir Sulaiman, JCA has since retired and as such we do not have the benefit of his view on the draft.

Appeal dismissed but award reduced.

Reported by Loo Lai Mee

F

G

H

I